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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ALBERT HESS,

Petitioner,

vs.

PORT AUTHORITY TRANS-HUDSON CORPORATION,

Respondent.

CHARLES F. WALSH,

Petitioner,

vs.

PORT AUTHORITY TRANS-HUDSON CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

WHETHER PORT AUTHORITY TRANS-HUDSON CORPORATION, A WHOLLY OWNED SUBSIDIARY OF A BI-STATE AGENCY CREATED BY INTERSTATE COMPACT, IS ENTITLED TO SOVEREIGN IMMUNITY FROM SUIT IN FEDERAL COURT UNDER THE ELEVENTH AMENDMENT.

LIST OF PARTIES

The Port Authority is a bi-State agency created in 1921 by a Congressionally-consented-to Compact to develop interstate public transportation, terminal, and other facilities of commerce within the statutorily defined Port District. 42 U.S. Stat. 174 (1921), consenting to 1921 N.J. Laws, Ch. 151 and 1921 N.Y. Laws, Ch. 154. The Compact is codified at N.Y. Unconsol. Laws §§6401-23 (McKinney 1979); N.J.S.A. §§32:1-1 to-24 (West 1990). Pursuant to the Compact, and subsequently enacted bi-State legislation supplemental thereto, the Port Authority owns and operates thirty-seven public facilities in the Port District. The Port Authority has no subsidiaries other than the Respondent, the Port Authority Trans-Hudson Corporation (PATH), a wholly-owned subsidiary, which owns and operates the PATH, an interurban electric rapid transit system between New York and New Jersey, and the Newark Legal and Communications Center Urban Renewal Corporation, which owns and operates an office building in Newark, New Jersey.

Petitioners Albert Hess and Charles F. Walsh are employees of PATH.

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BRIEF FOR RESPONDENT

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State.

Portions of the Compact and subsequently enacted bi-State legislation, N.Y. Unconsol. L. §§6401 *et seq.* (McKinney 1979); N.J.S.A. 32:1-1 *et seq.* (West 1990), specifically relied upon herein, are reproduced in an Appendix to this Brief (RA-1-RA-25).

SUMMARY OF ARGUMENT

This Court in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), articulated criteria for determining whether an interstate agency, such as the Port Authority and by extension, its wholly-owned subsidiary, Respondent PATH, is a State agency for Eleventh Amendment purposes or a political subdivision in the nature of a county or a municipality which, for apparently historical reasons, is not entitled to claim such immunity.

Applying and weighing all the *Lake Country Estates* factors, no one of which by itself is pre-eminent or controlling, PATH submits that the Port Authority is entitled to State agency status for Eleventh Amendment purposes inasmuch as the Legislatures of both States have declared many times that, in effectuating their statutory directives and authorizations, the Port Authority performs governmental functions, and both the federal and state courts have, without exception, held that it is a direct agency of the Compacting States themselves, engaged, on their behalf, in fulfilling functions of State, not as Petitioners would have it, local government.

Moreover, although state tax or other general state revenues strictly speaking would remain untouched by

judgments against the Port Authority, this factor does not make the agency, which presently is a *source*, rather than a recipient, of revenues for the Compacting States, any less a State agency. Indeed, the New York and New Jersey Legislatures have reserved to themselves the power to direct the flow of Port Authority monies.

PATH submits that an overemphasis on the so-called "state treasury" factor, misapplies the test of *Ford Motor Co. v. Dep't of Treasury of State of Indiana*, 323 U.S. 459 (1945). In *Ford*, this Court's focus on the state treasury was for the purpose of determining who was the real party in interest since state officials were named defendants.

Moreover, in unduly limiting the definition of "state treasury" to state tax or other general state revenues, Petitioners have fundamentally misinterpreted Eleventh Amendment jurisprudence since the protection of public funds cannot be the sole purpose of Eleventh Amendment immunity.[1] If it were, municipalities, counties, and other political subdivisions should be entitled to the protection of the immunity to protect the public funds entrusted to their authority. But, as noted above, historically they are not.

Notwithstanding the notion that the impetus for the Eleventh Amendment was the states' concern over potential liability for Revolutionary War debts, the Eleventh Amendment finds its continued significance in the vindication of state sovereign prerogatives in the name of

---

[1] Indeed, state treasury funds are reachable, notwithstanding the Eleventh Amendment, under certain circumstances, to wit: an award of attorney fees in an appropriate case or where the funds are to be expended in obedience to an injunction mandating that state officials conform their conduct to the requirements of federal law.

federalism. Consequently, the test developed in *Ford* to identify the proper party to a lawsuit should not be turned into a vehicle for federal court jurisdiction over a state agency.

POINT I

The Port Authority Of New York And New Jersey, As A Direct Agency Of Those States, Was Created To Be Immune From Suit Under The Eleventh Amendment.[2]

In *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), this Court specifically

> ...granted certiorari to decide whether the Tahoe Regional Planning Agency, an entity created by Compact between California and Nevada, is entitled to the immunity that the Eleventh Amendment provides to the compacting States themselves.

440 U.S. at 393 (footnote omitted).

---

[2] This same immunity applies no less to PATH, the Port Authority's wholly-owned subsidiary. The Legislatures of the two States have expressly stated that:

> Such subsidiary corporation ... shall have all of the privileges, immunities, tax exemptions and other exemptions of the port authority and of the port authority's property, functions and activities.

N.Y. Unconsol. L. §6612 (McKinney 1979); N.J.S.A. 32:1-35.61 (West 1990) (RA-12). The legislation also provides that:

> The directors of such subsidiary corporation shall be the same persons holding the offices of commissioners of the port authority. *Id.*

The task was to determine whether in creating the Tahoe Regional Planning Agency (TRPA), California and Nevada had created a state agency or a political subdivision. Thus,

> If an interstate compact discloses that the compacting States created an agency comparable to a county or municipality, which has no Eleventh Amendment immunity, the Amendment should not be construed to immunize such an entity.

Id. at 401.

In evaluating the TRPA, this Court looked to several factors. It analyzed the language of the compact to determine how the compacting states themselves denominated and considered the agency. So too, it looked to the compact's provisions with respect to how and by whom the agency's governing board was appointed, how the agency was funded, as well as the responsibility or lack thereof of the Compacting States' treasuries for the obligations of the agency. This Court took particular note of the fact that the function performed by the agency, land use planning, was "traditionally a function performed by local governments." *Id.* at 402.

This Court also searched for indicia of state control over the actions of the agency. Of great moment was the fact that there was no "veto at the state level" over the agency's authority to make rules within its own jurisdiction — a characteristic this Court found to be common to cities, towns, and counties as opposed to State agencies (*Id.*). This Court also took note of the fact that the TRPA was so independent of state control that one of the compacting states, California, had "resorted to litigation in an unsuccessful attempt to impose its will" on the agency. 440 U.S. at 402.

Therefore, with respect to TRPA this Court had no choice but to conclude that:

> . . . nothing short of an absolute rule [that any agency created by interstate compact has Eleventh Amendment immunity] would allow TRPA to claim the sovereign immunity provided by the Constitution to Nevada and California. *Id.*

Significantly, however, this Court did not find that any one of these factors was pre-eminent, or, in and of itself, controlling upon the question of Eleventh Amendment immunity. *See*, Point II, *infra*.

In applying the *Lake Country Estates* factors to the Port Authority, no such "absolute rule" is required for a finding of immunity. We shall now show that the Port Authority is entitled to invoke Eleventh Amendment immunity as an arm of the States of New York and New Jersey. *See*, *Port Auth. Police Benevolent Ass'n, Inc. (PBA) v. Port Auth. of N.Y. & N.J.*, 819 F.2d 413 (3d Cir. 1987), *cert. denied*, 484 U.S. 953 (1987).

A. The Port Authority was created to be a State agency, not a political subdivision in the nature of a county or a municipality.

The Port Authority of New York and New Jersey was created by a Congressionally-consented-to Interstate Compact between the two States, 42 U.S. Stat. 174 (1921), consenting to Ch. 154, Laws of New York, 1921; Ch. 151, Laws of New Jersey, 1921. In creating the Port Authority, both States expressly provided that the Port Authority should have those responsibilities and duties which were concurred in by the Legislatures of both States. N.Y. Unconsol. L. §6408 (McKinney 1979); N.J.S.A. 32:1-8 (West 1990) (RA-5).

Significantly, whenever the issue has arisen, the courts of New York and New Jersey uniformly have held that the Port Authority is a direct agency of the two States performing governmental functions on behalf of State government. Unable to refute these holdings, Petitioners improperly ignore this long, unbroken line of authority.

The New Jersey Supreme Court has described the Port Authority as having been created by the two States as their joint agent, to wit:

> In 1921 the Legislatures of New Jersey and New York authorized the execution of the port compact . . . establishing the Port of New York district and creating the Port of New York Authority as their joint agency.

Newark v. Essex County Bd. of Taxation, 54 N.J. 171, 175; 254 A.2d 513, 515 (1969), *cert. denied*, 396 U.S. 987 (1969).

Along the same lines, in *Trippe v. Port of N.Y. Auth.*, 14 N.Y.2d 119, 122-23; 198 N.E.2d 585, 586 (1964), the New York Court of Appeals described the Port Authority as "a governmental agency of the States of New York and New Jersey" and as "a direct agency" of the two States.

A number of decisions recognizing the nature of the Port Authority as a State agency were collected in *Port of N.Y. Auth. v. J.E. Linde Paper Company*, 205 Misc. 110, 113-114; 127 N.Y.S.2d 155, 158-159 (N.Y. Mun. Ct. 1953), wherein the court in unequivocal terms declared that:

> The Port Authority is an arm and agency of the States of New York and New Jersey, and in all of its activities, is engaged in the performance of essential governmental functions. (*Bush Term.*

Co. v. City of New York, 152 Misc. 144, *aff'd*, 282 N.Y. 306; *Commissioner of Internal Revenue v. Shamberg*, 144 F.2d 998, *certiorari denied* 323 U.S. 792; *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 484; *Helvering v. Gerhardt, supra*; *Gaynor v. Marohn*, 268 N.Y. 417, 424, 425; *People ex rel Buffalo & Port Erie Public Bridge Authority v. Davis*, 277 N.Y. 292, 299; *Port of New York Authority v. Township of Weehawken*, 27 N.J. Super. 328; *Sullivan v. Port of New York Authority*, 134 N.J.L. 124; *Miller v. Port of New York Authority*, 18 N.J. Misc. 601, 606).

The court went on to say:

> The Port Authority has uniformly been held to be in the position of "the State" whenever the issue has arisen.

Id.

In *Voorhis v. Cornell Contracting Corp.*, 170 Misc. 908, 912; 10 N.Y.S.2d 378, 381 (City Ct. N.Y. Co. 1938), the court referred to the Port Authority as the "immediate agent of two sovereigns," and said:

> Indeed, it is hard to see how there could be a clearer instance of an agency sharing the immunity of its creators.

Similarly, the New Jersey Supreme Court, in *Miller v. Port of N.Y. Auth.*, 18 N.J. Misc. 601, 606; 15 A.2d 262, 266 (Sup. Ct. 1939) said:

> Since the Authority is undoubtedly a direct state agency, exercising an essential governmental function, and, is therefore, an *alter ego* of the state, it follows that the present action is, in effect, a suit against the state itself which would,

> as we have seen, be clothed with sovereign immunity, unless a waiver or consent can be found in our State Constitution or in some special enactment.

More recently, in *Port Auth. of N.Y. & N.J. v. Bosco*, 193 N.J. Super. 696; 254 A.2d 676 (App. Div. 1984) (*per curiam*), cited by the Third Circuit in *PBA*, 819 F.2d at 418, the Appellate Division of the New Jersey Superior Court held that the Port Authority, as a State agency, shared New Jersey's sovereign exemption from the bar of the running of the statute of limitations. The Court explicitly held:

> Until 1951 the Port Authority "as an arm and agency of the states," enjoyed sovereign immunity from suit. See cases collected at *Port of N.Y. Authority v. Weehawken Tp.*, 27 N.J. Super. 328, 333 (Ch. Div. 1953), *rev'd other grounds*, 14 N.J. 570 (1954). *We see no merit to defendants' contention that because the Legislature abrogated this particular attribute of sovereignty by N.J.S.A. 32:1-157 the status of the Port Authority as a state agency was thereby withdrawn in all other respects.*

193 N.J. Super. at 700; 254 A.2d at 678 (emphasis supplied).

Completely ignoring this entire line of authority, Petitioners cite, as militating against the Port Authority's State agency status, the provision in the 1922 bi-State legislation describing the Authority as a "municipal corporate instrumentality of the two states." N.Y. Unconsol. L. §6459 (McKinney 1979); N.J.S.A. 32:1-33 (West 1990) (RA-10). However, as the above discussion makes plain, "municipal corporate instrumentality" is but one of many terms that have been used to describe the Port Authority. *See*, *PBA*, 819 F.2d at 414-15.

Indeed, more than a half century ago this very Court described the Port Authority as "a state instrumentality created by New York and New Jersey" and termed its work a "function which New York and New Jersey had undertaken to perform." *Graves v. New York, ex rel. O'Keefe*, 306 U.S. 466, 484 (1939).

Despite Petitioners' efforts in their Brief to establish in excrutiating detail the meaning of the term "body corporate and politic" under federal and state law, the fact is that no court, when squarely confronted with the question of the status of the Port Authority as a municipal corporation in contrast to that of a State agency, has so characterized the agency. See *Whalen v. Wagner*, 4 N.Y.2d 575, 584; 152 N.E.2d 54, 57-58 (1958), where the question was whether legislation dealing with the Port Authority required a Home Rule Message:

> There is no question, we think, that the legislation dealing with the Port Authority did not require a city message. The Port Authority is and of necessity has to be a State agency in view of its dual State character and functions.

Nearly fifty years ago in *Howell v. Port Auth.*, 34 F.Supp. 797 (D.N.J. 1940) a federal district court quite convincingly explained:

> The ordinary significance of the term municipal corporation is a city, town or village which is an incorporation of its inhabitants, governed by elected bodies having local self-government, with power to tax and without the obligation to report its activities directly to the executive branch of government.

> The Authority is not an incorporation of its inhabitants, but a Board of Commissioners appointed by officials elected by the states at large. The persons who inhabit The Port District have no direct right of vote with respect to the activities of The Authority.
>
> • • •
>
> The *legislatures*, in drafting §8 of the Comprehensive Plan did *not use the common and familiar term municipal corporation but the uncommon municipal corporate instrumentality, yet in the same context or framework, they used the word municipality to designate cities, towns and villages, and it seems unlikely, they would ignore the common and known term municipal corporation and select an uncommon term if they wished to establish a municipal corporation, as the Bank contends.* Further therein, pledging the credit of either state is prohibited. This would be totally unnecessary if the complainant's interpretation of municipal corporate instrumentality is accepted, ...

34 F.Supp. 797, 800 (emphasis added).

Thus, in *PBA*, the Third Circuit was able to rely upon the fact that the "long-standing judicial characterization of the Authority [as a state agency] has never been questioned by either state legislature despite the numerous opportunities to overrule these decisions. . . ." 819 F.2d at 415 (matter in brackets added).

B. The Port Authority is administered as a State agency.

Again, in sharp contrast to the facts before this Court regarding TRPA in *Lake Country Estates, supra,* where this Court was impressed by California's difficulty in controlling the actions of the agency, in the instant case, the Port Authority is clearly administered as a State agency. *See, inter alia, Mineo v. Port Auth. of N.Y. & N.J.*, 779 F.2d 939, 949 (3d Cir. 1985), *reh'g and reh'g en banc denied*, 783 F.2d 42 (3d Cir. 1986), *cert. denied*, 478 U.S. 1005 (1986). (Held: The Port Authority is the "State" for Tenth Amendment purposes.)

While TRPA's governors for the most part were county appointees, the Port Authority's twelve Commissioners are appointed by the State Governors – six by the Governor of New York and six by the Governor of New Jersey – and each must be confirmed by their respective State Senates. The Commissioners are chosen in the manner prescribed, and for terms fixed and determined from time to time, by the Legislature of each State. *See*, N.Y. Unconsol. L. §6405 (McKinney 1979); N.J.S.A. 32:1-5 (West 1990) (RA-10).[3] New York Commissioners may be removed upon charges and after a hearing by the Governor of the State (Section 4, Chapter 422, Laws of New York, 1930) and New Jersey Commissioners may be removed upon charges and after a hearing by the State Senate. (Section 4, Chapter 245,

[3] The first New Jersey Commissioners of the Authority were appointed to their office by the New Jersey Legislature itself (Ch. 152, Laws of N.J., 1921), while the New York Commissioners were named by the Governor of New York, with the advice and consent of the State Senate (Ch. 203, Laws of N.Y., 1921). In 1930, when the States transferred their Holland Tunnel to the Port Authority to operate as their agent, the New York Legislature designated by name three of the six New York Commissioners. (Ch. 422, Laws of N.Y., 1930).

Laws of New Jersey, 1930), codified as N.J.S.A. 32:2-5 (West 1990) (RA-25). Port Authority Commissioners take the oath of office constitutionally mandated for State officers by their respective States.

Furthermore, as recognized by this Court in *United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1,4 (1977), the Port Authority possesses no powers that have not been delegated to it by the Legislatures of the Compacting States. N.Y. Unconsol. Laws §6408 (McKinney 1979); N.J.S.A. 32:1-8 (West 1990) (RA-5). Indeed, in this regard, we note that in *Port of N.Y. Auth. v. Weehawken Township*, 14 N.J. 570; 103 A.2d 603 (1954), the New Jersey Supreme Court held that the Port Authority could not construct a third tube to the Lincoln Tunnel for the reason that the required express legislative authorization by the States was lacking. Thus, the New Jersey Supreme Court, per then New Jersey Supreme Court Justice Brennan, specifically held:

> ...it is our duty to declare the law to be as the Legislature has written it. It follows that *the Port Authority has no authority to proceed with the construction of the third tunnel until expressly authorized to do so by the two States.*

14 N.J. at 580; 103 A.2d at 608 (emphasis added).

Moreover, the Port Authority Compact provides for a gubernatorial veto power pursuant to which the Governor of either State retains the right to veto the actions of the Commissioners appointed from that State. N.Y. Unconsol. L. §6417 (McKinney 1979); N.J.S.A. 32:1-17 (West 1990) (RA-4).[4] The Governor of New Jersey possesses the

[4] The same gubernatorial veto power applies equally to the actions of PATH. N.Y. Unconsol. L. §6612 (McKinney 1979); N.J.S.A. 32:1-35.61 (West 1990) (RA-12).

veto power pursuant to N.J.S.A. 32:2-6 (West 1990); the Governor of New York, pursuant to N.Y. Unconsol. L. §§7151 *et seq.* (McKinney 1979) (RA-19).

The power to veto Commissioner actions naturally has led to close cooperation between both Governors and the Authority. In fact, the District of Columbia Circuit, in reversing the contempt of Congress conviction of a Port Authority official, specifically noted that:

> After being denied the opportunity to appear before the Subcommittee, the Governors wrote identical letters to their respective representatives on the Board of Commissioners of the Authority, instructing them to direct appellant not to comply with the subpoena. The Board of Commissioners so directed appellant on June 27, 1960.

Tobin v. United States, 306 F.2d 270, 271-72 (D.C. Cir. 1962), *cert. denied*, 371 U.S. 902 (1962).

As summarized by the Court of Appeals, a major issue raised by the Port Authority in this litigation was:

> 2. That "the subpoena issued by the Subcommittee, demanding documents relating to the internal administration of the Port Authority which the Governors of New York and New Jersey ordered appellant not to produce, [was] an unconstitutional invasion of powers reserved to the States under the Tenth Amendment to the Constitution."

Id. at 272.

It is significant that in making this argument the Port Authority and its official were supported by the Attorneys General of both New York and New Jersey. It is, indeed, difficult to imagine a more vivid example than this

controversy between the Port Authority and the States, on one side, and a Subcommittee of Congress, on the other, of the fact that the Port Authority is considered by the two States to be their direct instrumentality performing important governmental functions on their behalf.

Some additional examples of State control over Port Authority administration are the Port Authority's obligation to submit an annual report to the Legislatures, N.Y. Unconsol. L. §6408 (McKinney 1979); N.J.S.A. 32:1-8 (West 1990) (RA-5); the State Comptroller's authority to examine the Port Authority's books and accounts, N.Y. Unconsol. L. §7071 (McKinney 1979); N.J.S.A. 32:2-31 (West 1990) (RA-16); and the requirement of concurrence by the Legislatures before Port Authority rules and regulations become effective, N.Y. Unconsol. L. §6419 (McKinney 1979); N.J.S.A. 32:1-19 (West 1990) (RA-9).

Petitioners, citing *People v. Port of N.Y. Auth.*, 64 Misc.2d 563; 315 N.Y.S.2d 9 (Sup.Ct. N.Y.Co. 1970), mistakenly assert that inasmuch as the New York Attorney General has sought injunctive relief against this agency, "the Port Authority is not an arm of a state . . . subject to its control" (Petitioners' Brief at 30). The point that Petitioners miss is that when the States enacted the Authority's suability statute, their "declared policy" was "not to waive the Port Authority's immunity from injunctive suit by private individuals." *Lewis v. Lefkowitz*, 32 Misc.2d 434, 436, 437; 223 N.Y.S.2d 221, 223 (Sup.Ct. N.Y.Co. 1961), aff'd 17 A.D. 2d 778 (1st Dept. 1962). Rather, under the statute, "[t]his right is given only to the Attorney General who may, in his discretion, bring such suit on behalf of any individual." 32 Misc.2d at 436, 323 N.Y.S.2d at 222.[5]

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[5] *See* N.Y. Unconsol. L. §7105 (McKinney 1979); N.J.S.A. 32:1-161 (West 1990) (RA-18).

In commenting on this statutory provision, the New Jersey Supreme Court has said:

> Presumably, in enacting these identical statutes, both legislatures feared the immobilization of important public projects of the Port Authority and the attendant diversion of resources which might result from suits for injunctive relief. They sought to ensure, through these statutes, that only those suits first screened by a responsible public official might be brought.

Evans-Aristocrat Indus., Inc. v. City of Newark & Port Auth. of N.Y. & N.J., 75 N.J. 84, 90; 380 A.2d 268, 274 (1977).

Other cases which have commented on the Attorney General's statutory authorization to seek injunctive relief include *Wolkstein v. Port of N.Y. Auth.*, 178 F.Supp. 209, 213 (D.N.J. 1959) and *New York City Chapter of Nat'l Elec. Contractors Ass'n v. Fabber, et al.*, 73 Misc.2d 859, 861; 343 N.Y.S.2d 33, 35 (Sup.Ct. N.Y.Co. 1973) where the court said:

> It may be noted that pursuant to the compact and subsequent legislation, the Port Authority *on behalf of the 2 member states* owns or operates some 24 public terminal, transportation and other facilities within the port district, including 6 marine terminals. (Emphasis added).

Consequently, a private litigant's inability to obtain injunctive relief against the Port Authority without the Attorney General's presence, is proof, not lack of proof, that this agency partook of the States' sovereign immunity from suit.

Petitioners further argue that the Port Authority cannot be "subject to the control of the compacting states" (Petitioners' Brief at 31), citing the agency's opposition to

one particular 1958 New Jersey Assembly bill which would have required the Port Authority to operate passenger trains between New York and New Jersey. There are several problems with Petitioners' argument.

First of all, the activity apparently was in reference to the "legislative goals" of but one of the Compacting States. Petitioners have not and simply cannot establish that New York at that time was in agreement with this particular New Jersey "legislative goal." As Petitioners themselves point out, the Port Authority as an interstate agency, can act only in the behest of both States.[6] The fact is that in 1962, at the urging of and with the authorization of the two States the Port Authority *did assume* and has since operated a mass transit system between the two States. That system is the Port Authority Trans-Hudson Corporation, the Respondent in this matter.

Furthermore, it is not unusual for state agencies, be they interstate or single-state, to actively support or oppose a specific piece of legislation. Indeed, this Court may take notice of the fact that such activity is seen at the federal level as well. PATH respectfully submits that this is a normal incident of the political process in a government structured by separation of powers, where the executive and legislative may disagree.

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[6] In this regard we note that Petitioners' argument that the States, in their words, "relinquished" some aspect of their sovereignty in entering into the Interstate Compact creating the Port Authority is a *non sequitur* (Petitioners' Brief at 16). Petitioners have not and, indeed, cannot offer any support for their conclusion, which does not necessarily follow, that states are thereby unable to vest compact agencies with Eleventh Amendment immunity. Indeed, Petitioners are here arguing for a *per se* rule with respect to compact agencies which this Court implicitly rejected by employing its analysis in *Lake Country Estates, supra.*

Finally, the Port Authority can act only through its Board of Commissioners, who, as we have seen, are appointed by the Governors of the two States and whose actions are subject to gubernatorial veto. This certainly was true of the "safeguard" referred to in *United States Trust*, 431 U.S. at 8.

In sum, the Port Authority's Compact and subsequently enacted bi-State authorizing legislation make it quite clear that the Port Authority indeed is "in fact an arm of the State subject to its control..." within the meaning of this Court's opinion in *Lake Country Estates*, 440 U.S. at 402.

C. The Port Authority performs State, not local, functions.

TRPA, this Court noted in *Lake Country Estates, supra*, was engaged in "land use planning", which it characterized as "traditionally a function performed by local governments." 440 U.S. at 402. The instant case is thus easily distinguishable since the Port Authority, as noted above, is and has always been held to be an agency of the States created to carry out State functions, such as vehicular crossings and a unified air terminal network, which the Compacting States individually cannot efficiently perform because of the complication of competing sovereignties.

Contrary to Petitioners' position (Petitioners' Brief at 27), that the Port Authority performs State, and not local, governmental functions was the precise holding of the New York Court of Appeals in *Whalen v. Wagner, supra*. There the court, in ruling that no home rule message was necessary under the New York Constitution in connection with Port Authority legislation, expressly stated that prior

cases "...establish the Port Authority to be engaged in matters of State concern." 4 N.Y. 2d at 582; 152 N.E. 2d at 57.

That *Whalen v. Wagner*'s holding is correct is seen in the Preamble to the Compact of April 30, 1921 where the State Legislatures declared, in relevant part, as follows:

> Whereas,...the commerce of the port of New York has greatly developed and increased and *the territory in and around the port has become commercially one center or district;* and
>
> Whereas, It is confidently believed *that a better coordination of the terminal, transportation and other facilities of commerce in, about and through the port of New York, will result in great economies, benefiting the nation, as well as the states of New York and New Jersey;*[7] and

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[7] In addition we point out that access to Port Authority facilities is not limited to residents of the port district. Moreover, as will be more fully developed in subpoint D, *infra*, ten years after this legislative declaration in the Preamble, in enacting the general reserve fund legislation, specifically, N.Y. Unconsol. L. §7002 (McKinney 1979); N.J.S.A. 32:1-142 (West 1990) (RA-15), the Legislatures provided that any surplus Port Authority revenues be distributed as directed by the States. There is no restriction in that legislation that the distribution of such excess revenues be only within the Port of New York District. Thus, irrespective of any "localized" nature of Port Authority activities, the Authority is a State agency.

In this connection, indicative of the States' intention that the Port Authority be considered a State rather than a local instrumentality is the fact that the States adopted their 1921 Compact which created this agency in the form of an amendment to their 1834 agreement in which they settled a long standing boundary dispute. The 1834 agreement received the consent of Congress, 4 U.S. Stat. 708 (1834).

> Whereas, The future development of such terminal, transportation and other facilities of commerce will require the expenditure of large sums of money *and the cordial co-operation of the states of New York and New Jersey* in the encouragement of the investment of capital, and in the formulation and execution of the necessary physical plans; and
>
> Whereas, Such result can best be accomplished through the *co-operation of the two states by and through a joint of common agency;*

N.Y. Unconsol. Laws §6401 (McKinney 1979); N.J.S.A. 32:1-1 (West 1990) (emphasis supplied) (RA-1).

As the district court observed in *Howell, supra:*

> The Port Authority, a bi-state corporation (*Helvering, etc. v. Gerhardt*, 304 U.S. 405, 58 S.Ct. 969, 82 L.Ed. 1427), is a joint or common agency of the States of New York and New Jersey. It *performs governmental functions which project beyond state lines,...*

34 F.Supp. at 801. (emphasis added).

Indeed, Petitioners argue that the Port Authority should not share the States' Eleventh Amendment immunity citing as support for their position (Petitioners' Brief at 29) the provision in the Authority's Hudson Tubes-World Trade Center legislation which provides that all details of operating these facilities shall be within the Authority's sole discretion and its decision concerning such matters shall be controlling and conclusive; and further that no agency, commission or municipality of either State shall have jurisdiction over such facilities. N.Y. Unconsol. L. §6612 (McKinney 1979); N.J.S.A. 32:1-35.61 (West 1990)

(RA-12). Similar provisions can be found in other Port Authority legislation as well.[8]

We submit that these provisions, far from supporting the proposition that the Port Authority should not be accorded the States' Eleventh Amendment immunity, prove just the opposite. They—together with the statute's declaration that the effectuation of these projects by the Port Authority will be for the benefit of the people of the two States and that the Authority, in carrying out its responsibilities concerning these projects, shall be regarded as performing an essential governmental function[9]—reflect the clear bi-State legislative policy that, in developing and operating its facilities, the Port Authority stands in the shoes of the Compacting States themselves. In fact, it is precisely because the Port Authority functions as the

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[8] *See, e.g.*, Bridge and Tunnel Unification Act, N.Y. Unconsol. L. §§6502, 6512 (McKinney 1979); N.J.S.A. 32:1-119, 32:1-128 (West 1990); Air Terminal Act, N.Y. Unconsol. L. §§6631, 6634 (McKinney 1979); N.J.S.A. 32:1-35.1, 32:1-35.4 (West 1990); Bus Project Act, N.Y. Unconsol. L. §7201 (McKinney 1979); N.J.S.A. 32:2-23.27 (West 1990); Industrial Development Project Act, N.Y. Unconsol. L. §7180 (McKinney 1979); N.J.S.A. 32:1-35.59 (West 1990).

[9] The Port Authority's Hudson Tubes—World Trade Center legislation provides that the effectuation of these projects:

> ...are and will be in all respects for the benefit of the people of the states of New York and New Jersey, for the increase of their commerce and prosperity and for the improvement of their health and living conditions; and the port authority and any subsidiary corporation incorporated for any of the purposes of this act shall be regarded as performing an essential governmental function in undertaking the effectuation thereof, and in carrying out the provisions of law relating thereto.

N.Y. Unconsol. L. §6610 (McKinney 1979); N.J.S.A. 32:1-35.59 (West 1990) (RA-11).

proxy or *alter ego* of the States that the Legislatures provided that no other agency of either State can review its determinations – determinations which, we emphasize, are always subject to gubernatorial veto.[10]

D. The insulation of the States' tax and other general revenues from judgments against the Port Authority does not mean that Port Authority revenue is not State revenue.

Although it is true that the Port Authority may not draw upon State tax revenue nor pledge the credit of the States, it is equally true that the assets it administers as agent for the two States are held for the benefit of the people of the States. The Legislatures of the Compacting States in authorizing the Port Authority to expend funds in the effectuation of various projects have expressly stated that the undertaking of such projects is for the benefit of the people of the two States. Thus, as noted above, in authorizing the Port Authority to operate PATH, the Legislatures explicitly stated:

> The effectuation, of... the Hudson tubes and the Hudson tubes extensions,... are and will be in all respects for the benefit of the people of the states of New York and New Jersey, for the increase in their commerce and prosperity and for the improvement of their health and living conditions; and the port authority and any subsidiary corporation incorporated for any of the purposes of this act shall be regarded as performing an essential governmental function in undertaking the effectuation thereof, and in carrying out the provisions of law relating thereto.

[10] The only exception is with respect to the power of the New Jersey Governor to veto the minutes relating to fixing of tolls for Port Authority bridges. N.J.S.A. 32:2-9 (West 1990)

N.Y. Unconsol. L. §6610 (McKinney 1979); 32:1-35.59 (West 1990) (RA-11). Similar statements can be found in legislation authorizing the effectuation of other public projects by the Port Authority.

Furthermore, even though the Port Authority cannot legally impose any financial obligation upon the States, bi-State legislation demonstrates not only that the States view the Authority as their agent in effectuating the public projects which they authorize, but the legislation also discloses a close, meaningful relationship between State and Port Authority finances. This close financial relationship, we believe, demonstrates the extremely unrealistic, myopic view of the Petitioners' definition of what constitutes a "state treasury".

Thus, in its early years, the Port Authority was supported by State appropriations until its revenues became adequate to meet its expenses. N.Y. Unconsol. L. §6416 (McKinney 1979); N.J.S.A. 32:1-16 (West 1990) (RA-6). And when it appeared that the Authority faced a default on its Series "A" bonds which were issued to finance its two Arthur Kill bridges – the Outerbridge Crossing and the Goethals Bridge – the States transferred their Holland Tunnel (together with its revenue flow) to the Port Authority. The Holland Tunnel was the first vehicular crossing to be constructed between the States. It was built by separate State Commissions, acting jointly, pursuant to a 1919 Interstate Compact to which Congress consented, 41 U.S. Stat. 158 (1919).

In the words of Erwin W. Bard in his *The Port of New York Authority* (Columbia University Press, 1942), the Holland Tunnel was transferred in order, *inter alia*,

> ...to safeguard the Port Authority's previous commitments... The Holland Tunnel... earned

> in 1930 a net income...of $5,034,094. By transferring its income to the Port Authority and anticipating its eventual refinancing, an annual surplus between $1,000,000 and $1,500,000 could be expected. This would be sufficient to save the bridge bonds...at p. 238

After noting that the transfer of the Holland Tunnel to the Port Authority was designed "to help place the Port Authority on a self-sustaining basis," the court in *United States Trust Co. v. State of N.J.*, 134 N.J. Super. 124, 141; 338 A.2d 833, 842 (L. Div. 1975), *aff'd*, 69 N.J. 253; 353 A.2d 514 (1976), *rev'd*, 431 U.S. 1 (1977), went on to say that "Simultaneously, the states enacted...the General Reserve Fund Act." This legislation required that the Authority pool the surplus revenues it derived from the facilities it constructed or acquired through the issuance of its bonds, notes, or other obligations, and establish a general reserve fund. N.Y. Unconsol. L. §7002 (McKinney 1979); N.J.S.A. 32:1-142 (West 1990) (RA-15). As described in *United States Trust Company, supra:*

> The act pledges the general reserve fund as security for ...bonds...issued by the Authority. Surplus moneys of the Authority in excess of the general reserve fund requirements may be used for any purpose authorized by the states.

Id.

Thus, the two Legislatures not only directed the use and flow of Port Authority revenue, but made it quite clear that any surplus revenue could be utilized as authorized by the two States.

Finally, the budget of this agency, since it is both adopted and administered by a Board of Commissioners

appointed by the Governors and subject to gubernatorial veto, is hardly akin to that of any other type of political subdivision in either State. Also unlike political subdivisions, which generally are recipients of State monies, Port Authority funds, as previously noted, are used for projects authorized by the State Legislatures, thus providing the States with alternative means of financing and effectuating important public projects. For example, the Legislatures have recently authorized the Port Authority to purchase buses which it leases *without charge* to public and private transportation entities in both States, N.Y. Unconsol. L. §§7201 *et seq.* (McKinney Supp. 1989); N.J.S.A. 32:2-23.27 *et seq.* (West 1990)[11] (RA-22-RA-24). Effectuation of the States' 440 million dollar Bus project (1993 Annual Report at 66) is only possible if there are sufficient Port Authority funds available. Money being fungible, the unavailability of Port Authority funds as a result, for example, of having to pay a money judgment would mean that the two States would have to look to their general treasuries to fund important projects or else deny the public the benefit of such services.[12] In that sense, then, the Port

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[11] Significantly, for purposes of the Bus project, the port district was legislatively expanded to a radius of seventy-five miles around the Port Authority Bus Terminal. *See*, N.Y. Unconsol. L. §7202 (10) (McKinney Supp. 1989); N.J.S.A. 32:2-23.28 (j) (West 1990) (RA-25).

[12] Additionally, it should be emphasized that the Port Authority, in recent years, working closely with both Governors and pursuant to legislative authorization of 250 million dollars (1993 Annual Report at 65), is spending many millions of dollars for economic development and infrastructure renewal in the two States.

For example, at the request of the Governor of New Jersey, the Port Authority has authorized expenditures, pursuant to its Marine Terminal legislation, specifically, N.Y. Unconsol. L. §6673 (McKinney Supp. 1989); N.J.S.A. 32:1-35.30 (West 1990) (RA-14), to provide

(Footnote continued)

Authority's money is a component of a "state treasury" since Port Authority money is being used for the benefit of the people of the two States for projects which must be authorized by their Legislatures.

Indeed, the New Jersey Supreme Court looking at this relationship between the States and the Port Authority in realistic pragmatic terms indicated that there can be multiple "state treasuries" when it said:

> ...the general taxpayer too has an interest in such agencies [as the Port Authority]. First, he might be asked to provide the facilities if the State could not supply them through the agency. In fact the Holland Tunnel [which the Port Authority has operated since 1930] was built with the funds of the States. Next, these agencies may also furnish facilities that are not self-supporting and hence would burden the general taxpayer if furnished directly by the State. This, we gather, is true of the Port Authority. Further, it may be doubted as a practical matter that government would walk away from an agency which founders;

improvements to Conrail's northern branch lines for its freight operations in order to permit the New Jersey Department of Transportation to provide a light-rail transit way to improve regional passenger transportation. Similarly, at the request of the Governor of New York, the Port Authority has authorized expenditures, pursuant to its Industrial Development legislation, specifically, N.Y. Unconsol. L. §7172(e) (McKinney 1979); N.J.S.A. 32:1-35.73(e)(West 1990) (RA-20-RA-21), for the construction of the Center for Advanced Technology Telecommunications, which is to be a part of a major redevelopment in downtown Brooklyn known as Metrotech. The commitment to the New York State Department of Transportation's Oak Point Freight Rail Link Project alone is over 106 million. (1993 Annual Report at 66) These expenditures, like the Bus project, do not provide revenues for the Port Authority.

> financial failure would prejudice the acceptance of the bonds of other agencies of the same sovereign. And finally, the net assets of these agencies belong to the States that created them, and the taxpayers and citizens will profit from the use to which they are put after the bonds are liquidated.

Port of N.Y. Auth. v. Hackensack Water Co., 41 N.J. 90, 106, 107; 195 A.2d 1, 17, 18 (1963).[13]

Thus, we submit that in a practical down-to-earth sense a judgment against the Port Authority ultimately has the same effect as one against the Compacting States themselves and, therefore, the Port Authority meets this *Lake Country Estates* criterion as well. In this connection, we note that Petitioners stress the fact (Petitioners' Brief at 38) that the Port Authority, pursuant to statute, places its surplus revenues in a general reserve fund which it pledges as security for its obligations. They fail to mention, however, the further provision, fully set forth above, in the Authority's General Reserve Fund Act that permits the States to direct the flow of surplus reserve fund revenue.

[13] Although the Port Authority has liquidated many of its prior series of bonds, at the present time it has nearly $5.8 billion in outstanding obligations. (*See* 1993 Annual Report at 41.) This is because, over the years, existing Authority facilities had to be modernized and expanded, and the States have periodically assigned new powers and duties to this agency. As already noted, the Authority continues to provide the States with important new facilities, including non-revenue producing projects relating to economic development and infrastructure renewal and, of course, this agency continues to operate, on behalf of the States, deficit facilities such as PATH.

POINT II

The Argument That The Port Authority Cannot Be A State Agency For Eleventh Amendment Purposes Results From A Misinterpretation Of Eleventh Amendment Jurisprudence.

We respectfully submit that the Petitioners' analysis of the "state treasury" factor is defective. More specifically, the notion that the phrase "state treasury" is referable only to state tax or other general state revenues constitutes a fundamental misinterpretation of Eleventh Amendment jurisprudence.

In *Lake Country Estates*, in acknowledging this factor as but one of the elements to be weighed, this Court made the simple observation that "some agencies exercising state power have been permitted to invoke the Amendment in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself." 440 U.S. at 400-01 (footnote omitted). Apart from the fact that requiring that a judgment "have the same practical consequences as a judgment against the State", actually indicates that a judgment *need not* be paid from general state revenue, nowhere in the *Lake Country Estates* opinion is there any indication that this factor is, *by itself*, controlling. Indeed, in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 101 n.11 (1984), this Court held that suits against the sovereign are found not only where the judgment "would expend itself on the public treasury", but also where the public administration would be interfered with or a judgment would either compel or restrain the government in its actions, citing, *Dugan v. Rank*, 372 U.S. 609, 620 (1963). In point of fact, suits seeking injunctive relief against the state are as much barred by the Eleventh

Amendment as are suits for money damages. *See, inter alia, Alabama v. Pugh*, 438 U.S. 781, 782 (1978).

Moreover, an overly restrictive view of what constitutes a "state treasury" is a result of a fundamental misinterpretation of Eleventh Amendment jurisprudence. The purpose of the Eleventh Amendment cannot be merely to protect "public" funds. If it were, cities and counties, whose funds are just as "public", should be entitled to invoke the immunity. Yet they are not. *See, Lake Country Estates*, 440 U.S. at 401; *Mount Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280-1 (1977); *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890).[14] Rather, the Eleventh Amendment, as this Court has counseled time and again, embodies the recognition of state sovereignty as a limitation upon the Article III judicial power.

Indeed, in *Ford Motor Co. v. Dep't of Treasury of State of Indiana*, 323 U.S. 459 (1945), cited by Petitioners and in *Lake Country Estates, supra*, and the case most often cited for the importance of the "state treasury" factor, this Court's focus upon the potential liability of the State treasury was for the purpose of determining who was, in fact, the real party in interest since individuals were nominal defendants, and a point apparently had been raised that the presence of such individuals as named defendants created federal court jurisdiction. This Court's words are clear and admit of no other interpretation:

> And when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled

[14] The *Lincoln County* Court did not really articulate a reason for differentiating between the State and political subdivisions for this purpose. Apparently what has developed is a purely historical distinction.

> to invoke its sovereign immunity from suit even though individual officials are nominal defendants. (citations omitted)

323 U.S. at 464. Similarly, in *Edelman v. Jordan*, 415 U.S. 651, *reh'g denied*, 416 U.S. 1000 (1974), cited by Petitioners, again the focus on the "state treasury" was for the purpose of identifying the real party in interest where state officials were the only named defendants.[15] Furthermore, both *Edelman* and *Ford* preceded *Lake Country Estates* with its specific test for Eleventh Amendment immunity.

Notwithstanding Petitioners' allusion to the notion that the states' concerns over potential liability for Revolutionary War debts was the impetus for passage of the Eleventh Amendment, that the protection of state treasury funds is not this Court's *raison d'etre* for Eleventh

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[15] In *Edelman* this Court stated:

> [T]he rule [that] has evolved [is] that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment.

415 U.S. at 663. While that proposition is certainly true, it does not necessarily then follow that if a judgment is not paid from a state's general tax coffers, Eleventh Amendment immunity cannot be found under *Lake Country Estates, supra*. However, PATH respectfully submits that its treasury, dedicated to state governmental purposes, N.Y. Unconsol. §6610 (McKinney 1979); N.J.S.A. §32:1-35.59 (West 1990) (RA-11), its uses legislatively constrained, N.Y. Unconsol. §§6404, 6408 (McKinney 1979); N.J.S.A. §§32:1-4, 32:1-8 (West 1990) (RA-2, RA-5), and subject to gubernatorial veto, N.Y. Unconsol. §6612 (McKinney 1979); N.J.S.A. §32:1-35.57 (West 1990) (RA-12), is a state treasury within the meaning of *Ford*, *Edelman*, and *Lake Country Estates*.

Amendment immunity is also well-established by the fact that the Eleventh Amendment is not necessarily a bar to such funds being expended in an award of attorney's fees. *See, Kentucky v. Graham*, 473 U.S. 159, 170-71 (1985); *Hutto v. Finney*, 437 U.S. 678, 695 (1978). Nor is the Eleventh Amendment a defense when these funds are expended in obedience to the dictates of an injunction mandating that state officials conform their conduct to federal law. *See, Quern v. Jordan*, 440 U.S. 332, 338 (1979); *see also, Milliken v. Bradley*, 433 U.S. 267, 289 (1977).

The fact is, as this Court repeatedly has emphasized, that the Eleventh Amendment finds its continuing significance in the vindication of state sovereign prerogatives. *See, Pennhurst, supra*, "we must be guided by '[t]he principles of federalism that inform Eleventh Amendment doctrine' ", 465 U.S. at 100, citing *Hutto, supra*, 437 U.S. at 691. If that is so, of what possible moment is it in how many or in what particular coffers the state chooses to divide up its assets? PATH respectfully submits that the test developed in *Ford, supra,* to determine the real party in interest to a lawsuit should not be turned into a vehicle for federal court jurisdiction over a state agency.

Thus, while it is certainly open to this Court to restrict the term "state treasury" for Eleventh Amendment purposes, PATH respectfully submits that it nevertheless would be in derogation of the "principles of federalism" to disqualify an entity like the Port Authority, which, as we fully established in Point I, *supra,* and, as found by the Third Circuit, clearly "functions as an agency of the state...." *PBA*, 819 F.2d at 417.

In point of fact, far from stressing the "state treasury" factor, this Court's opinion in *Lake Country Estates*, is

more properly read as being directed at, not surprisingly in view of the Eleventh Amendment's deference to state sovereignty, the intention of the states in creating the agency, with the agency's financial structure being just one factor in gleaning that intention. Thus, this Court has made it clear that the appropriate judicial inquiry is whether:

> ...there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose....

Lake Country Estates, 440 U.S. at 401. The Third Circuit in *PBA*, did just that, finding:

> ...although the Authority is no longer directly funded by the states, we conclude that the *history* of its financial structure, and the *statutory constraints* placed on the use of its funds, indicate that *the Authority is considered an arm of the states by New York and New Jersey*.

819 F.2d at 416 (emphasis supplied).[16]

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[16] It should be noted that Petitioners have misinterpreted the Third Circuit's decision in *PBA* in arguing that the *PBA* holding was based on an erroneous finding that the two States were statutorily obligated to make appropriations should a judgment against the Port Authority deplete its resources (Petitioners' Brief at 37-39). That particular language in *PBA*, however, is just as consistent with a finding that the States, in carrying out their solemn obligations pursuant to the bi-State Compact, would make such an appropriation. In essence, this is what occurred, when, as previously pointed out, the Port Authority faced the prospect of financial ruin due to an impending default on its early bridge bonds. As we have seen, the States then came to its rescue by their transfer of the financially successful Holland Tunnel to the Authority.

(Footnote continued)

In sum, *Lake Country Estates* clearly established that the focus of judicial inquiry in Eleventh Amendment claims should be directed at determining the intent of the Compacting States. In the case of the Port Authority, the requisite "good reason to believe" that the States intended to create an agency cloaked with Eleventh Amendment immunity is self-evident. For irrespective of its current financial self-sufficiency, in forming the Port Authority in 1921, the States of New York and New Jersey, in fact, did create, and Congress consented[17] to the creation of, an agency that

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So too, Petitioners for some reason find significant the fact that any state appropriation to cover judgments against the Port Authority could not be made without gubernatorial consent. How requiring the consent of the highest elected State official to such an appropriation which, after all, is an ordinary incident of the legislative process, negates State agency status is something of a mystery.

In any event, the *PBA* decision in no way turned upon any such statutory obligation. In fact, the Third Circuit specifically noted that:

> ...the Authority's current funding structure *does not* provide conclusive evidence that the Authority is an agency of the state....

819 F.2d at 416 (emphasis supplied).

[17] Petitioners set great store by the debates preceding Congress' consent to the Comprehensive Plan in an attempt to show that Congress could not have intended "to cloak the Port Authority with Eleventh Amendment immunity" (Petitioners' Brief at 25). Petitioners' reliance is sorely misplaced. As even Petitioners are forced to admit, these Congressional colloquies, expressing concern over the preservation of federal rights and Article I regulatory jurisdiction over the navigable waters within the Port of New York District, quite obviously had nothing whatsoever to do with the Eleventh Amendment whose subject is the Article III judicial power.

Moreover, Petitioners' argument betrays another fundamental misunderstanding of Eleventh Amendment jurisprudence. In sharp

(Footnote continued)

was, in the absence of bi-State legislative consent to suit even in the courts of the Compacting States, "totally immune from suit". *PBA*, 819 F.2d at 418; *accord*, *Howell*, 34 F.Supp. at 801; *Trippe*, 14 N.Y.2d at 123; 198 N.E.2d at 586.

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contrast to Congress' well-recognized power to abrogate Eleventh Amendment immunity for claims arising under particular federal statutes (*see*, for example, *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) (Eleventh Amendment immunity abrogated by the CERCLA statute); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (Eleventh Amendment immunity abrogated by the Civil Rights Act of 1964)), this Court has never held that Congress possesses any power whatsoever "to cloak" an entity with Eleventh Amendment immunity. As this Court made absolutely clear in *Lake Country Estates*, *supra*, the power to cloak a state instrumentality with Eleventh Amendment immunity, resides in the creating states, 440 U.S. at 401.

CONCLUSION

The Order of the Court of Appeals Should Be Affirmed.

Dated: June 15, 1994

Respectfully submitted,

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APPENDIX

N.Y. Unconsol. L. §6401; N.J.S.A. §32:1-1

Preamble

Whereas, In the year eighteen hundred and thirty-four the states of New York and New Jersey did enter into an agreement fixing and determining the rights and obligations of the two states in and about the waters between the two states, especially in and about the bay of New York and the Hudson River; and

Whereas, Since that time the commerce of the port of New York has greatly developed and increased and the territory in and around the port has become commercially one center or district; and

Whereas, It is confidently believed that a better coordination of the terminal, transportation and other facilities of commerce in, about and through the port of New York, will result in great economies, benefiting the nation, as well as the states of New York and New Jersey; and

Whereas, The future development of such terminal, transportation and other facilities of commerce will require the expenditure of large sums of money and the cordial co-operation of the states of New York and New Jersey in the encouragement of the investment of capital, and in the formulation and execution of the necessary physical plans; and

Whereas, Such result can best be accomplished through the co-operation of the two states by and through a joint or common agency.

Now, therefore, The said states of New Jersey and New York do supplement and amend the existing agreement of eighteen hundred and thirty-four in the following respects:

COMPACT ARTICLE III

N.Y. Unconsol. L. §6404; N.J.S.A. 32:1-4

Port Authority of New York and New Jersey created

There is hereby created "The Port of New York Authority" (for brevity hereinafter referred to as the "Port Authority"), which shall be a body corporate and politic, having the powers and jurisdiction hereinafter enumerated, and such other and additional powers as shall be conferred upon it by the legislature of either state concurred in by the legislature of the other, or by act or acts of congress, as hereinafter provided. On and after July first, nineteen hundred seventy-two, the port authority shall be known and designated as "The Port Authority of New York and New Jersey."

COMPACT ARTICLE IV

N.Y. Unconsol. L. §6405; N.J.S.A. 32:1-5

Commissioners; appointment; term; removal

The port authority shall consist of twelve commissioners, six resident voters from the state of New York, at least four of whom shall be resident voters of the city of New York, and six resident voters from the state of New Jersey, at least four of whom shall be resident voters within the New Jersey portion of the district, the New York members to be chosen by the state of New York and the New Jersey members by the state of New Jersey in the manner and for the terms fixed and determined from time to time by the legislature of each state respectively, except as herein provided. Each commissioner may be removed or suspended from office as provided by the law of the state from which he shall be appointed.

COMPACT ARTICLE VI

N.Y. Unconsol. L. §6407; N.J.S.A. 32:1-7

Powers of port authority; comprehensive plan for development of port

The port authority shall constitute a body, both corporate and politic, with full power and authority to purchase, construct, lease and/or operate any terminal or transportation facility within said district; and to make charges for the use thereof:[1] and for any of such purposes to own, hold, lease and/or operate real or personal property, to borrow money and secure the same by bonds or by mortgages upon any property held or to be held by it. . . .

COMPACT ARTICLE VII

N.Y. Unconsol. L. §6408; N.J.S.A. 32:1-8

Additional powers; reports; pledging of credit

The port authority shall have such additional powers and duties as may hereafter be delegated to or imposed upon it from time to time by the action of the legislature of either state concurred in by the legislature of the other. Unless and until otherwise provided, it shall make an annual report to the legislature of both states, setting forth in detail the operations and transactions conducted by it pursuant to this agreement and any legislation thereunder. The port authority shall not pledge the credit of either state except by and with the authority of the legislature thereof.

COMPACT ARTICLE XV

N.Y. Unconsol. L. §6416; N.J.S.A. 32:1-16

Appropriations for expenses

Unless and until the revenues from operations conducted by the port authority are adequate to meet all expenditures, the legislatures of the two states shall appropriate, in equal amounts, annually, for the salaries, office and other administrative expenses, such sum or sums as shall be recommended by the port authority and approved by the governors of the two states, but each state obligates itself hereunder only to the extent of one hundred thousand dollars in any one year.

COMPACT ARTICLE XVI

N.Y. Unconsol. L. §6417; N.J.S.A. §32:1-17

Quorum; veto power

Unless and until otherwise determined by the action of the legislatures of the two states, no action of the port authority shall be binding unless taken at a meeting at which at least three of the members from each state are present, and unless a majority of the members from each state present at such meeting but in any event at least three of the members from each state, shall vote in favor thereof. Each state reserves the right to provide by law for the exercise of a veto power by the governor thereof over any action of any commissioner appointed therefrom.

COMPACT ARTICLE XVII

N.Y. Unconsol. L. §6418; N.J.S.A. 32:1-18

Incurring obligations for expenses

Unless and until otherwise determined by the action of the legislatures of the two states, the port authority shall not incur any obligations for salaries, office or other administrative expenses, within the provisions of article fifteen,[1] prior to the making of appropriations adequate to meet the same.

COMPACT ARTICLE XVIII

N.Y. Unconsol. L. §6419; N.J.S.A. §32:1-19

Rules and regulations

The port authority is hereby authorized to make suitable rules and regulations not inconsistent with the constitution of the United States or of either state, and subject to the exercise of the power of congress, for the improvement of the conduct of navigation and commerce, which, when concurred in or authorized by the legislatures of both states, shall be binding and effective upon all persons and corporations affected thereby.

N.Y. Unconsol. L. §6459; N.J.S.A. 32:1-33

Powers of port authority and municipalities in executing plan; securities tax exempt; limitations

* * *

"The port authority shall be regarded as the municipal corporate instrumentality of the two states for the purpose of developing the port and effectuating the pledge of the states in the said compact, but it shall have no power to pledge the credit of either state or to impose any obligation upon either state, or upon any municipality, except as and when such power is expressly granted by statute, or the consent by any such municipality is given."

N.Y. Unconsol. L. §6610; N.J.S.A. §32:1-35.59

Purpose

The effectuation of the world trade center, the Hudson tubes and the Hudson tubes extensions, or any of such facilities constituting a portion of the port development project, are and will be in all respects for the benefit of the people of the states of New York and New Jersey, for the increase of their commerce and prosperity and for the improvement of their health and living conditions; and the port authority and any subsidiary corporation incorporated for any of the purposes of this act shall be regarded as performing an essential governmental function in undertaking the effectuation thereof, and in carrying out the provisions of law relating thereto.

N.Y. Unconsol. L. §6612; N.J.S.A. §32:1-35.61

General powers; local laws; subsidiary corporation

* * *

Nothing in this act shall be deemed to prevent the port authority from establishing, acquiring, owning, leasing, constructing, effectuating, developing, maintaining, operating, rehabilitating or improving all or any portion of the port development project through wholly owned subsidiary corporations of the port authority or from transferring to or from any such corporations any moneys, real property or other property for any of the purposes of this act. If the port authority shall determine from time to time to form such a subsidiary corporation it shall do so by executing and filing with the secretary of state of New York and the secretary of state of New Jersey a certificate of incorporation, which may be amended from time to time by similar filing, which shall set forth the name of such subsidiary corporation, its duration, the location of its principal office, and the purposes of the incorporation which shall be one or more of the purposes of establishing, acquiring, owning, leasing, constructing, effectuating, developing, maintaining, operating, rehabilitating or improving all or any portion of the port development project. The directors of such subsidiary corporation shall be the same persons holding the offices of commissioners of the port authority. Such subsidiary corporation shall have all the powers vested in the port authority itself for the purposes of this act except that it shall not have the power to contract indebtedness. Such subsidiary corporation and any of its property, functions and activities shall have all of the privileges, immunities, tax exemptions and other exemptions of the port authority and of the port authority's property, functions and activities. Such subsidiary corporation shall be subject to the restrictions and limitations to which the port authority may be subject, including, but

not limited to the requirement that no action taken at any meeting of the board of directors of such subsidiary corporation shall have force or effect until the governors of the two states shall have an opportunity, in the same manner and within the same time as now or hereafter provided by law for approval or veto of actions taken at any meeting of the port authority itself, to approve or veto such action. Such subsidiary corporation shall be subject to suit in accordance with section nine of this act and chapter three hundred one of the laws of New York of nineteen hundred fifty and chapter two hundred four of the laws of New Jersey of nineteen hundred fifty-one as if such subsidiary corporation were the port authority itself. Such subsidiary corporation shall not be a participating employer under the New York retirement and social security law or any similar law of either state and the employees of any such subsidiary corporation, except those who are also employees of the port authority, shall not be deemed employees of the port authority.

* * *

N.Y. Unconsol. L. §6673; N.J.S.A. 32:1-35.30

Definitions

The following terms as used herein shall mean:

"Marine terminals" shall mean developments, consisting of one or more piers, wharves, docks, bulkheads, slips, basins, vehicular roadways, railroad connections, side tracks, sidings or other buildings, structures, facilities or improvements, necessary or convenient to the accommodation of steamships or other vessels and their cargoes or passengers and shall also mean waterfront development projects. It shall also include such highway projects in the vicinity of a marine terminal providing improved access to such marine terminal as shall be designated in legislation adopted by the two states. Notwithstanding any contrary provision of law, general, special or local, it shall also mean railroad freight projects related or of benefit to a marine terminal or which are necessary, convenient or desirable in the opinion of the port authority for the protection or promotion of the commerce of the port district, consisting of railroad freight transportation facilities or railroad freight terminal facilities; and any equipment, improvement, structure or facility or any land, and any building, structure, facility or other improvement thereon, or any combination thereof, and all real and personal property in connection therewith or incidental thereto, deemed necessary or desirable in the opinion of the port authority, whether or not now in existence or under construction, for the undertaking of such railroad freight projects.

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N.Y. Unconsol. L. §7002; N.J.S.A. §32:1-142

Establishment of general reserve fund

In all cases where the port authority has raised or shall hereafter raise moneys for the establishment, acquisition, construction or effectuation of terminal and/or transportation facilities by the issue and sale of bonds legal for investment, as herein defined and limited, the surplus revenues received by or accruing to the port authority from or in connection with the operation of such terminal and/or transportation facilities built in whole or in part by the proceeds of the sale of such bonds shall be pooled and applied by it to the establishment and maintenance of a general reserve fund in an amount equal to one-tenth (1/10) of the par value of all bonds legal for investment, as herein defined and limited, issued by the port authority and currently outstanding. The moneys in the said general reserve fund may be pledged in whole or in part by the port authority as security for or applied by it to the repayment with interest of any moneys which it has raised or may hereafter raise upon any bonds, legal for investment, as herein defined and limited, and made and issued by it for any of its lawful purposes; and the said moneys may be applied by the port authority to the fulfillment of any other undertakings which it has assumed or may or shall hereafter assume to or for the benefit of the holders of any of such bonds.

Any surplus revenues not required for the establishment and maintenance of the aforesaid general reserve fund shall be used for such purposes as may hereafter be directed by the two said states.

N.Y. Unconsol. L. §7071; N.J.S.A. §32:2-31

Examination of books and accounts

Notwithstanding the provisions of any general or special statutes, the comptroller of the state of New York and the comptroller of the state of New Jersey and their legally authorized representatives are hereby authorized and empowered from time to time to examine the accounts and books of the port of New York authority, including their receipts, disbursements, contracts, leases, sinking fund, investments and such other items referring to their financial standing and receipts and disbursements as such comptroller may deem proper. Such examination may be made by either comptroller at any time or by both comptrollers acting together.

N.Y. Unconsol. L. §7101; N.J.S.A. 32:1-157

Consent to suits against the Port Authority

Upon the concurrence of the state of New Jersey in accordance with section twelve[1] hereof, the states of New York and New Jersey consent to suits, actions or proceedings of any form or nature at law, in equity or otherwise (including proceedings to enforce arbitration agreements) against the Port of New York Authority[2] (hereinafter referred to as the "Port Authority"), and to appeals therefrom and reviews thereof, except as hereinafter provided in sections two through five,[3] inclusive, hereof.

N.Y. Unconsol. L. § 7105; N.J.S.A. 32:1-161

Actions for injunction against the Authority

The foregoing consent does not extend to suits, actions or proceedings for judgments, orders or decrees restraining, enjoining or preventing the port authority from committing or continuing to commit any act or acts, other than suits, actions or proceedings by the attorney general of New York or by the attorney general of New Jersey — each of whom is hereby authorized to bring such suits, actions or proceedings in his discretion on behalf of any person or persons whatsoever who requests him so to do except in the cases excluded by sections two, three and four of this act; provided, that in any such suit, action or proceeding, no judgment, order or decree shall be entered except upon at least two days' prior written notice to the port authority of the proposed entry thereof.

N.Y. Unconsol. L. §7151; N.J.S.A. 32:2-6 et seq.

Action of commissioners to be approved or vetoed by Governor

Except as provided by this act,[1] no action taken at any meeting of the port of New York authority[2] by any commissioner appointed from the state of New York shall have force or effect until the governor of the state of New York shall have an opportunity to approve or veto the same under the provisions of article sixteen of the port compact or treaty entered into between the states of New York and New Jersey, dated April thirtieth, nineteen hundred and twenty-one.[2]

N.Y. Unconsol. L. §7172; N.J.S.A. 32:1-35.73

Definitions

The following terms as used herein shall have the following meanings:

* * *

e. "Industrial development project or facility" or "port district industrial development project or facility" shall mean any equipment, improvement, structure or facility or any land, and any building, structure, facility or other improvement thereon, or any combination thereof, and all real and personal property, located within the New York portion of the port district or within a municipality in the New Jersey portion of the port district which qualified for state aid under the provisions of P.L., 1971, C.64 as most recently supplemented by P.L., 1978, C.14 or which may hereafter qualify for such aid, including, but not limited to, machinery, equipment and other facilities deemed necessary or desirable in connection therewith, or incidental thereto, whether or not now in existence or under construction, which shall be considered suitable by the port authority for manufacturing, research, non-retail commercial or industrial purposes within an industrial park, or for purposes of warehousing or consumer and supporting services directly related to any of the foregoing or to any other port authority project or facility; and which may also include or be an industrial pollution control facility or a resource recovery facility, provided that no such industrial development project or facility may include or be a facility used for the storage

of chemicals, fuel or liquified natural gas unless incidental to the effectuation of such industrial development project or facility;

* * *

N.Y. Unconsol. L. §7201; N.J.S.A. §32:2-23.27

Legislative findings and determinations

The states of New York and New Jersey hereby find and determine that:

(1) the efficient, economical and convenient mass transportation of persons to, from and within the port of New York district as defined in the compact between the two states dated April thirtieth, nineteen hundred twenty-one (hereinafter called the "port district") is vital and essential to the preservation and economic well being of the northern New Jersey-New York metropolitan area;

(2) in order to deter the economic deterioration of the northern New Jersey-New York metropolitan area adequate facilities for the mass transportation of persons must be provided and buses are and will remain of extreme importance in such transportation;

(3) the provision of mass transportation including bus transportation in urban areas has become financially burdensome and may result in the additional curtailment of significant portions of this essential public service;

(4) the economic viability of the existing facilities operated by the port authority of New York and New Jersey (hereinafter called the "port authority") is dependent upon the effective and efficient functioning of the transportation network of the northern New Jersey-New York metropolitan area and access to and proper utilization of such port authority facilities would be adversely affected if users of bus transportation were to find such transportation unavailable or significantly curtailed;

(5) buses serving regional bus routes and feeder bus routes and ancillary bus facilities constitute an essential part of the mass commuter facilities of the port district;

(6) the continued availability of bus transportation requires substantial replacement of and additions to the number of buses presently in use in the northern New Jersey-New York metropolitan area;

(7) the port authority which was created by agreement of the two states as their joint agent for the development of transportation and terminal facilities and other facilities of commerce of the port district and for the promotion and protection of the commerce of their port, is a proper agency to provide such buses to each of the two states and such provision of buses by the port authority is in the interest of the continued viability of the facilities of the port authority, and is in the public interest;

(8) the operation of the facilities of the port authority, including but not limited to the port authority bus terminal at forty-first street and eighth avenue in New York county in the city and state of New York and the extension thereto currently under construction (hereinafter called the "bus terminal"), the George Washington bridge bus station and the provision of buses and ancillary bus facilities pursuant to this act involve the exercise of public and essential governmental functions which must be performed by the two states or any municipality, public authority, agency, or commission of either or both states;

(9) the revision to the port authority bridge and tunnel toll schedules which was effective May fifth, nineteen hundred seventy-five, is expected to result in additional revenues to the port authority sufficient to support the financing with consolidated bonds of the port authority of approximately four hundred million dollars for passenger mass transportation capital projects (hereinafter called "passenger facilities"), approximately one hundred sixty million dollars thereof being allocated to the extension to the bus terminal, with the remaining two hundred forty million dollars to be allocated on the basis of one hundred twenty million dollars in each state for passenger facilities, including but not limited to the acquisition, development and financing of buses and related facilities, as determined by each such state and the port authority acting pursuant to legislative authorization and commitments to the holders of port authority obligations; and

(10) the port authority's function as a regional agency of the two states makes it appropriate that line-haul regional bus route passenger facilities be equipped pursuant to this act with buses and ancillary bus facilities and that the need for development of such routes be satisfied on a priority basis.

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N.Y. Unconsol. L. §7202; N.J.S.A. 32:2-23.28

Definitions

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(10) "regional bus area" shall mean that area in the states of New York and New Jersey which lies within a radius of seventy-five miles of the bus terminal.

N.J.S.A. 32:2-5

Removal

Any commissioners of the port authority from this state may be removed upon charges and after a hearing by the senate.

Chapter 422, Laws of New York, 1930

Removal

Any commissioners of The Port of New York Authority from the state of New York may be removed upon charges and after a hearing by the governor.